BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON K. HERBEL	)	
Claimant	)	
	)	
VS.	)	
	)	
CHIEF INDUSTRIES	)	
Respondent	)	Docket No. 261,533
	)	
AND	)	
	)	
CRAWFORD & COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed Administrative Law Judge Bruce E. Moore's January 25, 2002, Award. The Board heard oral argument on July 12, 2002.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. Michael D. Streit of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant medical compensation and temporary total disability benefits for a work-related left knee injury. He did not award claimant any permanent

partial general disability benefits because he found that claimant's injury was simply a temporary left knee injury. Claimant appealed.

On appeal, claimant argues that she is entitled to permanent partial general disability benefits because the preponderance of the evidence supports that she sustained permanent disability in both her knees as a result of her position with respondent. Conversely, respondent requests the Board to affirm the ALJ's award because the only evidence supporting claimant's position is not based on the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

Claimant worked for respondent from August 22, 1988, until the plant closed on October 25, 2000.[2] Her various positions over the years required her to continuously kneel, stoop, and squat.[3] Claimant initially experienced problems with her knees in 1990 and 1991.[4] She received conservative treatment during that time. But, no treating physician diagnosed a permanent medical condition or assigned permanent work restrictions.[5]

In April 1997, claimant again sought treatment for knee problems and related those problems to her work with respondent. She reported bilateral knee pain, but sought treatment only for the left knee.[6] Dr. Jeryl G. Fullen performed an unremarkable arthroscopic surgery on the left knee and provided conservative treatment until he released claimant to return to work without restrictions on May 12, 1997.[7] The physician did note that claimant might consider another position if she continued to suffer knee pain and problems. Nonetheless, as before, claimant continued working in the same position with respondent.[8]

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[1] Hereinafter AMA Guides (4th ed.).

[2] McNish Depo. at 4-5.

[3] R.H. Trans. at 12-13, 18.

[4] R.H. Trans. at 13; Wilcox Depo. at 4; Fullen Depo at 7-11; Loewen Depo., Ex. 2.

[5] Wilcox Depo. at 4-7; Fullen Depo. at 7; Loewen Depo., Ex. 2.

[6] Fullen Depo. at 7, 29.

[7] Fullen Depo. at 9.

[8] R.H. Trans. at 16-17.

But claimant also continued to have bilateral knee pain and problems, and she again sought treatment from Dr. Fullen in April 1998. Once again, Dr. Fullen performed an unremarkable arthroscopic surgery on the left knee, and released claimant to return to work on June 1, 1998, this time with instructions not to "get down on her knees." Despite this restriction, the physician did not find "any long-term impairment" at the time.[9]

Thereafter, respondent placed claimant in a position thought to be less stressful on her knees.[10] Although the position was somewhat different, claimant continued to have pain and problems in both knees because the new position also required kneeling, stooping, and squatting.[11] But claimant did not seek additional medical treatment for either knee after June 1998.

At claimant's attorney's request, orthopedic surgeon Dr. Jonathon Loewen performed an independent medical examination of claimant on February 23, 2001.[12] Dr. Loewen determined that claimant suffered from permanent bilateral patella chondromalacia[13] as a result of her repetitive work activities with respondent.[14] As a result of this condition, the physician assigned permanent work restrictions and further opined that claimant suffered a five percent permanent impairment of function to each knee, or a four percent whole body impairment under the AMA Guides (4th ed.).[15] He attributed claimant's disability directly to her repetitive work activities with respondent.

The Board finds claimant's testimony[16] coupled with Dr. Loewen's medical opinion supports the conclusion that claimant sustained injury and permanent disability to both knees as a result of her work activities with respondent up to and including her last date worked on October 25, 2000. The Board is mindful of the evidence in the record reflecting separate and distinct knee injuries before claimant's last date worked. But claimant's

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[9] Fullen Depo. at 10-11.

[10] R.H. Trans. at 21.

[11] R.H. Trans. at 21-22.

[12] Loewen Depo. at 4.

[13] This condition is a degenerative condition in the cartilage of the kneecap.

[14] Loewen Depo. at 6.

[15] This impairment rating was based on Dr. Loewen's general use and knowledge of the AMA Guides (4th ed.). Loewen Depo. at 6-7, 32.

[16] *See Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. ___ (2001)(holding a workers compensation claimant's testimony alone is sufficient evidence of claimant's physical condition).

testimony regarding the fact that she suffered from long-term, ongoing pain and problems in both knees related to her repetitive work activities is bolstered by her repeated reports to physicians over the years. While the physicians may have primarily treated claimant's left knee, particularly in 1997 and 1998, the Board finds that it is more probably true than not true that she at all times suffered from bilateral knee pain.

The Board is similarly mindful of the medical evidence in the record reflecting that claimant did not suffer permanent functional impairment related to her work activities before June 1998. But the uncontroverted evidence reflects that Dr. Fuller warned claimant as early as 1997 that she should consider a position that would not require repetitive knee movements. Moreover, claimant possessed permanent work restrictions against repetitive knee movements by 1998. And the simple fact remains that claimant did not heed these medical warnings and continued to violate her permanent work restrictions from June 1998 to October 2000. Thus, despite the evidence relating to specific knee injuries and permanent disability before 1998, the Board finds claimant continued to suffer trauma and aggravation by a series of accidents through her last day worked.

Respondent did not present any medical evidence regarding claimant's condition after June 1998. As a result, the Board adopts the uncontroverted medical opinion of Dr. Loewen and finds that claimant, at the very least, sustained a bilateral repetitive use injury to both knees from June 1998 until October 2000, her last day worked.

The Board is cognizant of respondent's argument regarding the questionable nature of Dr. Loewen's permanent impairment rating. However, Dr. Loewen testified that his impairment rating was based on his general knowledge and understanding of the AMA Guides (4th ed.), and the Board finds that respondent failed to so undermine the credibility of his medical opinion as to render it not credible. The Board, therefore, finds claimant sustained a 4 percent whole body functional impairment as the result of his work-related bilateral knee injuries. Additionally, the Board finds that, since claimant has not earned at least 90 percent of her pre-injury average weekly wage since her last day of work with respondent, she is entitled to permanent partial general disability benefits based on her work disability percentage.

Claimant's work disability percentage is determined by averaging claimant's wage loss percentage and her task loss percentage. The Board finds that claimant's wage loss percentage varied over time. The parties stipulated to a $397.11 pre-injury average weekly wage. From October 26, 2000, to December 23, 2000, claimant was off work entirely. But the Board finds that claimant is not entitled to a 100 percent wage loss during that time because she was off work because of her pregnancy, not her work-related injury. During that time, the Board finds that claimant sustained a 35 percent wage loss, which represents an imputed wage based on claimant's subsequent employment.

From December 24, 2000, to May 2, 2001, claimant sustained a 100 percent wage loss as she made a good faith effort to find appropriate employment.[17] On May 2, 2001, claimant obtained a full-time position earning $260 per week. Ninety days thereafter, she received a raise and began earning $280 per week. Accordingly, the Board finds that claimant sustained a 35 percent wage loss between October 26, 2000, and December 23, 2000, a 100 percent wage loss between December 24, 2000, and May 2, 2001, a 35 percent wage loss between May 3, 2001, and August 2, 2001, and a 29 percent wage loss beginning August 3, 2001.

As for claimant's task loss, both Dr. Fullen and Dr. Loewen provided testimony regarding claimant's task loss.[18] However, Dr. Loewen was the only physician that examined claimant after June 1998 and her last day of work with respondent in October 2000. As a result, the Board finds that Dr. Loewen was in the best position to evaluate the percentage of claimant's task loss resulting from her work-related injury. While Dr. Loewen reviewed the task lists compiled by both claimant's expert and respondent's expert, Dr. Loewen never rendered an opinion as to task loss based on respondent's expert's report.[19] As to claimant's expert Jerry Hardin's opinion, Dr. Loewen agreed with Mr. Hardin that claimant sustained a 48 percent task loss as she lost the ability to perform 15 of the 31 tasks performed in the last 15 years of her employment. Therefore, the Board finds that claimant sustained a 48 percent task loss as the result of her work-related injury.

The Board concludes for the following periods claimant's work disability is as follows:

1. From October 26, 2000, through December 23, 2000, or 8.43 weeks, claimant is entitled to a 41.5 percent work disability (35 percent wage loss averaged together with a 48 percent task loss).

2. From December 24, 2000, through May 2, 2001, or 18.57 weeks, claimant is entitled to a 74 percent work disability (100 percent wage loss averaged together with a 48 percent task loss).

3. From May 3, 2001 through August 2, 2001, or 13.14 weeks, claimant is entitled to a 41.5 percent work disability (35 percent wage loss averaged together with a 48 percent task loss).

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[17] *Copeland v. Johnson Group*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

[18] Fullen Depo. at 19-26, 36-39; Loewen Depo. at 7-10, 23-29.

[19] Loewen Depo. at 28-30.

4. Beginning August 3, 2001, claimant is entitled to a 38.5 percent work disability (29 percent wage loss averaged together with a 48 percent task loss).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Bruce E. Moore's January 25, 2002, Award should be and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sharon Herbel, and against the respondent, Chief Industries, and its insurance carrier, Crawford & Company, for an accidental injury sustained on October 25, 2000, and based upon an average weekly wage of $397.11.

Claimant is entitled to 8.93 weeks of temporary total disability compensation at the rate of $213.38[20] per week or $1,905.48, followed by 8.43 weeks of permanent partial general disability at the rate of $264.75 per week or $2,231.84 for a 41.5 percent permanent partial general disability for the period after the 8.93 weeks of temporary total disability compensation until December 23, 2000, followed by 18.57 weeks of permanent partial disability compensation at the rate of $264.75 per week or $4,916.41, for a 74 percent permanent partial general disability for the period of December 24, 2000, to May 2, 2001, followed by 13.14 weeks of permanent partial disability at the rate of $264.75 per week or $3,478.82 for a 41.5 percent permanent partial general disability for the period May 3, 2001, to August 2, 2001, followed by 119.64 weeks of permanent partial disability at the rate of $264.75 per week or $31,674.69 for a 38.5 percent permanent partial general disability for the period after August 2, 2001, making a total award of $44,207.24.

As of March 31, 2003, claimant is entitled to 8.93 weeks of temporary total disability compensation at the rate of $213.38 per week or $1,905.48, followed by 117.78 weeks of permanent partial general disability at the rate of $264.75 per week or $31,182.26, for a total due and owing claimant of $33,087.74, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of $11,119.50 of permanent partial general disability compensation shall be paid at $264.75 per week until claimant is fully paid or until further order of the Director.

Future medical treatment may be awarded upon proper application to and approval by the Director.

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[20] The parties agreed at oral argument that claimant's temporary total disability weekly rate was $213.38 per week because the temporary total disability compensation was paid before the plant closed and, therefore, did not include fringe benefit costs.

Claimant is entitled to the unauthorized medical allowance of $500, upon presentation of an itemized statement verifying the same.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Michael D. Streit, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation